82-536

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO._____

GENEVIEVE BERGER, Petitioner,

-against-

FRED BERGER, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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QUESTIONS PRESENTED

1. Does the denial of custody of the mother's children to the petitioner-mother based solely on probation and psychological evaluations made of the parties, with no expert testimony as to these evaluations from the authors, and where one evaluation made of petitioner was pursuant to a cursory examination of petitioner, and where these reports were almost a year old at the time of trial, violate the petitioner's due process right to confront adverse witnesses as is provided for by the Fourteenth Amendment of the United States Constitution?

2. Does the denial of the right to bring in a psychiatrist of petitioner's choice to testify as to his findings after evaluation, violate petitioner's due process right to present her own arguments and oral evidence as is provided for by the Fourteenth Amendment?

3. Does the deprivation of contact between the mother and children constitute a violation of due process?

4. Did the Supreme Court of New Jersey violate petitioner's due process rights in its failure to consider its own recent landmark custody case of Beck v. Beck, (1981) where New Jersey became the first court of last resort in the country to place its imprimatur on the concept of shared legal and physical custody even where it was not requested by either parent, all in violation of due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution?

5. Does the deprivation of children from their natural mother and the deprivation of the mother from the children constitute cruel and inhuman punishment as prohibited by the Eighth Amendment?

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1. Certiorari should be granted to review the holding of the Court below; the defendant-petitioner was denied custody of the children based on certain psychiatric and psychological reports. The doctors and psychologists who wrote the reports, did not testify and were not subject to cross-examination, as is required by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Court denied the defendant-petitioner the right to have a psychiatrist of her choice evaluate the family situation..... 7

2. In granting custody of the infant children of the parties' marriage, namely Ronald Berger, Lisa Berger and Jeffrey Berger, to the plaintiff-respondent husband, the New Jersey Superior Court rendered a decision contrary to the basic questions of the best interests of the children, relying upon stale reports, almost a year old, which had no current validity..... 12

3. The holding of the Court below, that the petitioner would be allowed visitation only under supervised and controlled conditions to be determined by an approved agency, is not justified by the weight of the evidence, and is not only not in the best interest of the children, but in effect, amounts to a complete deprivation of access to these children, as no agency has ever been appointed for such purpose, nor is such an agency known to exist. Thus, the order was impossible to fulfill, and the holding effectively denies the petitioner her right to visit her children, constituting a violation of due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution..... 14

4. The Supreme Court of New Jersey failed to consider its own recent landmark custody case of Beck v. Beck, (1981) where New Jersey became the first court of last resort in the country to place its imprimatur on the concept of shared legal and physical custody even where it was not requested by either parent, all in violation of due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution..... 14

5. In depriving the petitioner custody of her three children and any access thereto, and in depriving the three children of their mother, petitioner and her

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children were subjected to cruel and unusual punishment prohibited by the Eighth Amendment of the Constitution..... 17

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Snyder v. Massachusetts, (1934), 291, U. S. 97, 54 S. Ct. 330, 78 L Ed. 674.

Trop v. Dulles, (1958) 356 U. S. 86, 2L Ed. 2d 630, 78 S. Ct. 590.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982
NO. _____

GENEVIEVE BERGER, Petitioner,

-against-

FRED BERGER, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Petitioner respectfully prays that a writ of certiorari issue to review the final order of the Supreme Court of the State of New Jersey, entered herein on June 21, 1982 denying a review of this matter upon petitioner's application.

OPINION BELOW

The order of the Court below denied the petition for certification.

JURISDICTION

The final order of the New Jersey Supreme Court denying petitioner's application for certification

was made and entered on June 21, 1982 and is appended hereto, infra at p. 21. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Does the denial of custody of the mother's children to the petitioner-mother based solely on probation and psychological evaluations made of the parties, with no expert testimony as to these evaluations from the authors, where one evaluation made of petitioner pursuant to a cursory examination of petitioner, and with these reports were almost a year old at the time of trial, violate the petitioner's due process right to confront adverse witnesses as is provided for by the Fourteenth Amendment of the United States Constitution?

2. Does the denial of the right to bring in a psychiatrist of petitioner's choice to testify as to his findings after evaluation, violate petitioner's due process right to present her own arguments and oral evidence as is provided for by the Fourteenth Amendment?

3. Does the deprivation of contact between the mother and children constitute a violation of due process?

4. Did the Supreme Court of New Jersey violate petitioner's due process rights in its faiure to consider its own recent landmark custody case of Beck v. Beck, (1981) where New Jersey became the first

court of last resort in the country to place its imprimatur on the concept of shared legal and physical custody even where it was not requested by either parent, all in violation of due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution?

5. Does the deprivation of children from their natural mother and the deprivation of the mother from the children constitute cruel and inhuman treatment as prohibited by the Eighth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

The principal constitutional provisions involved are the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Eighth Amendment of the United States Constitution.

STATEMENT OF THE CASE

This petition devolves from a matrimonial action tried in the Chancery Division, Superior Court of New Jersey, Passaic County, during December, 1980.

The plaintiff husband is employed by American Cyanamid as a Process Engineer Supervisor, and has been employed by American Cyanamid for nearly twenty years. He has an undergraduate degree in Chemical Engineering from New York University, and Master's degree in Industrial Engineering, from New York University.

The defendant wife has been substantially unemployed during the marriage. At the present time she is attending college.

The parties were married on June 29, 1963 and three children were born of the marriage. Ronald, age 15 (born April 5, 1967), Lisa, age 13, (born April 7, 1969) and Jeffrey, age 9, (born September 20, 1971); all are unemancipated.

With respect to the question of custody, the issue of temporary custody had previously been adjudicated following a testimonial hearing in March, 1980, some nine months prior to the trial of the within matter. Over counsel's objection, (See Appendix, Excerpt from Transcript of Trial, p 55) medical and psychiatric reports were admitted into evidence in the proceedings without any professional or expert testimony being elicited, disregarding that the father physically and emotionally abused the children and the wife, travelled a great deal to advance his career while the mother solely raised the children. The only testimony received at trial was that of the parents of the children. The Court conducted an in-camera interview with the children, concluding that the two oldest children expressed a preference to remain with their father, while the youngest wished to remain with his mother. The trial court determined that the plaintiff-respondent father should have custody of the children, based not on firm evidence, which would

permit the Court to conclude that the placing of custody with the plaintiff-husband was in the best interests of the children, but upon its review of a probation report and certain psychological evaluations of the parties, where no expert testimony based on these reports were taken by the Court.

The trial court further determined that the defendant-petitioner could visit with the children only under the direct supervision of a social agency. Although the parents and the children were all living in the same home, the petitioner-mother was ordered to see her children through a non-existent agency. No social agency has been found to implement this order as of this date, effectively denying defendant-petitioner total access to her three children, and denying to the children access to their mother.

This matter came on for trial in the Superior Court of New Jersey before the Honorable Harold M. Nitto, Judge of the Superior Court. Judge Nitto rendered his opinion on December 22, 1980.

In late 1979, plaintiff-respondent filed his complaint for divorce in extreme cruelty. On or about January 10, 1980, defendant-petitioner filed her answer denying the allegations of the complaint, and seeking a judgment of separate maintenance by way of counterclaim for extreme cruelty.

Thereafter, a number of applications were made by both parties seeking relief from the lower

court. Two testimonial hearings were then held by the Court, the first on March 7, 1980, the second occurring on July 26, 1980. Pursuant to the first hearing, the plaintiff-respondent was granted temporary custody. The second hearing resulted in the defendant-petitioner leaving the marital dwelling and being permitted to visit her children only under specific conditions.

Following the trial, The Court entered judgment of divorce on January 13, 1981, awarding plaintiff a judgment of divorce; awarding custody of the children to the plaintiff-respondent, subject to defendant-petitioner's rights of visitation only under controlled and supervised conditions, and under the auspices of an approved agency to be approved by the Court, and not otherwise.

Thereafter, the defendant filed her Notice of Appeal from the Judgment of Divorce. Defendant then moved for a new trial, and for other relief, but her application was denied by the trial court.

On February 25, 1981, the Notice of Appeal was filed in this matter with the Superior Court of New Jersey, Appellate Division, where the Judgment of the Chancery Division entered in this matrimonial matter was affirmed; The New Jersey Supreme Court refused review.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This case presents the issue of whether a moth-

er's children may be taken away from her based solely on the Court's review of evaluations and psychiatrist reports made of the parties almost a year prior to trial which reports were considered by the trial court over objection (See Appendix, Transcript of December 16, 17 and 18, 1980, p 55), where no expert was called upon to testify at the trial regarding said reports, (See Appendix, Transcript of December 16, 17 and 18, 1980, p 57) and the authors of the reports were not subject to cross-examination, with a consequent loss of due process.

It also presents the issue of the propriety of the Supreme Court in refusing to review a custody case when it had already determined, in its landmark custody case of Beck v. Beck, 86 N.J. 480, 432 A. 2d 63, that joint custody may be ordered on the court's own motion, and over objection, thus violating petitioner's due process rights. In addition, the question is raised as to whether under the circumstances herein, the determination of the trial court constitutes cruel and unusual punishment prohibited by the Eighth Amendment.

1. In 1965, the Confrontation Clause was held applicable to the states: Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 LED 2d 923 (1965). Clearly, due process requires that a party to an action must be permitted the right to confront adverse witnesses, pursuant to the Fourteenth Amendment.

The decision that was rendered in this case not only denied petitioner custody of her three children based on stale reports made after cursory examinations, and without the production of the petitioner's psychiatrists, but in effect, totally denied petitioner her children and visitation rights to her children.

The claim that the effect of the Court's decision was to deny petitioner her right to visit her children, stems from the fact that no such agency through which visitation may be arranged, and as provided for in the Court's decision, (See Appendix, Judge Nitto's final decision December 22, 1980, p 27) has ever been found, nor has any attempt been made by the Court to set up an appointment for this purpose, despite numerous attempts to do so by the petitioner. One such attempt was made by the petitioner, as may be seen in a letter from Monroe Y. Mann, petitioner's attorney, to the State of New Jersey, Department of Human Services Division of Youth and Family Services, dated January 12, 1982, which was ignored. (See Appendix page 43.

The trial Court relied upon reports, and over objection, admitted those reports into evidence. (See Appendix, Trial Transcript dated December 16, 17, & 18, p. 55). The reports contained allegations which can fairly be described as reactions of the defendant's (mother's) part to assaults committed outside of the marital home upon the children by the father, and reactions to what the defendant perceived as aberrant behavior

committed by the plaintiff. Although the defendant-petitioner presented her testimony most eloquently at trial, as to why she felt the best interest of the children would be served if they were in her custody, her testimony was ignored by the Court in reaching its conclusions in this matter. What was relied upon by the Court were reports of some vintage; however, the thrust of this petition lies in the fact that no expert was called upon to testify, denying petitioner her due process right to cross-examine doctors. Had the psychiatrists been produced, and cross-examination been permitted, and had the mother been permitted to produce her own psychiatrist, the childrens' welfare would have been served, and they may very well be still with their mother.

Cross-examination is "beyond doubt the greatest legal engine ever invented for the discovery of truth". 5 Wigmore §1367 p. 29.

Beginning with Snyder v. Massachusetts, 291, U. S. 97, 54 S. Ct. 330, 78 L Ed. 674 (1934), the Court began to speak of confrontation as an aspect of procedural due process, thus extending its applicability to state cases and to federal cases other than criminal. The deportation case of Bridges v. Wixon, 326, U. S. 135, 65 S. Ct. 1443, 89 L Ed. 2103 (1945), may be read broadly as imposing a strictly construed right of confrontation in all kinds of cases.

These cases clearly indicate the trend toward making the confrontation clause and the right to cross-examine adverse witnesses, a basic fundamenal right in civil cases as well as criminal cases.

The general preference for oral testimony is designed to provide opportunity for live cross-examination and observation of demeanor of a witness. **Carter-Wallace, Inc. v. Otte,** (1972, C.A. 2 N.Y.) 474 F 2d 529, cert den. 412 U.S. 929, 37 L Ed. 2d 156, 93 S.Ct. 2753.

In fact, on page 33 of Judge Nitto's decision of March 7, 1980, he refers to and bases his decision on reports and evaluations made by certain doctors. There was never an expert on the witness stand to testify in open Court as to how these reports were made, under what circumstances they were made, and if the situation among the parties had changed since these reports were last made.

Where the best interest of the child is a criteria to be met by the Court, every possible precaution should have been taken, so as to assure the Court and the parties involved, a full and fair hearing to what the best interest of the children would be. By denying the petitioner her opportunity to cross-examine these doctors, and particularly by denying petitioner the right to have a psychiatrist of her choice examine the parties involved, a violation of the Fourteenth Amendment due

process clause was committed, and we ask this Court to rectify this most unfortunate situation.

Judge Nitto's decision rendered on March 7, 1980, indicates on page 37 of the transcript of his decision that "...I wonder if the Court is given that kind of power." In reality, the Judge is calling into question whether the Court actually had the power to act as it did in denying a mother custody of her three children and reasonable access to them. Also on page 37 of Judge Nitto's decision of March 7, 1980, he refers to "a kind of a disturbance that borders in the area of the unknown." To base a decision on "kind of disturbance" calls into question the true basis for this Judge's decision, and questions the validity and unfounded reasoning that existed in mind.

Judge Nitto had ordered psychiatric examinations done on an "emergency" basis for the entire Berger family by Dr. Herbert Barken, Psychiatrist (See Appendix, Order 1, dated January 29, 1980, p. 51).

The second court order by Judge Nitto to the Probaiton Department pertaining to a psychiatric and diagnostic evaluations, and all investigations were ordered to be done on a "crash" basis to be completed within (7) seven days of the Order. (See Appendix, Order 2, dated January 29, 1980, p. 53).

There is nothing wrong with judicial expediency, but not when it jeopardizes a persons' due process rights, especially when this person is a mother

of three children in danger of losing her children upon a doctor's report. A judge's order to the Probation Department to examine a person and make an evaluation upon a "crash basis" cannot give the Probation Department the adequate time which is needed to evaluate such a critical situation.

Dr. Barken, being ordered by the Judge to make his evaluations on an "emergency basis" surely restricts the evaluation from the start.

In view of the above orders by Judge Nitto, and in view of the fact that these reports and evaluation were made on a "crash" and emergency basis, and then relied upon heavily in the Judge's final decision, leaves no doubt that petitioner's due process rights were violated.

The issue of how full and fair a hearing must be before custody of children may be denied to a natural mother, is of great importance and pecularly appropriate for the exercise of this Court's discretionary jurisdiction.

2. Aside from the obvious violation of due process rights, as seen when petitioner's right to confrontation was denied, petitioner was also denied the right to present a psychiatrist of her choice to examine the parties and testify as to the findings. This denial represents a violation of petitioner's due process right to present her own arguments and evidence.

On July 11, 1980, the defendant-petitioner made application to have the plaintiff-respondent, and the infant children, examined by Dr. Frieda Spady, Pediatric Psychiatrist, which was denied by Judge Harold M. Nitto, J. S. C. on July 29, 1980. (See Appendix, Order of Judge Nitto filed July 30, 1980, p. 46) This order denies petitioner's application to have the plaintiff-respondent father and the infant children to be examined by Dr. Frieda Spady.

Once again, on October 24, 1980, a motion was made by defendant's attorneys for the mother to to be allowed to speak freely with the children on the telephone and upon meeting them in public places. The children should be free of fear of being reprimanded physically or verbally by the plaintiff-respondent father when they speak to petitioner mother. This motion was denied and filed with the Court on November 12, 1980. (See Appendix, Order of Judge Nitto filed November 12, 1980, p. 49).

If an analogy may be made to the Federal Rules of Criminal Procedure, Rule 28(a) states that "nothing in this rule limits the parties in calling expert witnesses of their own selection."

For due process to follow through to civil matters, it is a blatant violation of due process rights for the petitioner to be denied a psychiatrist of her choice to be permitted to examine the parties involved, and testify in court pursuant to such examination.

3. The violation of due process rights as to denial of custody is compounded by the decision rendered by the Superior Court, where it was ordered that, (See Appendix,Judgment of Divorce, p 27),

> Defendant shall be entitled to visitation with the infant children of the marriage only under controlled and supervised conditions and under the auspices of an approved agency to be approved by the Court, and not otherwise.

As stated above, these arrangements for visitation have been non-existent to date, resulting in the total deprivation of petitioner-mother from seeing her three children with the sanction of contempt, if she tries to see them.

This total deprivation of contact with the childrens' mother by the Court, violates but the basic tenet of life, and the ideal that children should grow up influenced by both parents, learning about life through the guidance and love of both parents, whenever possible.

4. In July, 1981, the New Jersey Supreme Court "rendered a landmark custody decision, which represents[1] a radical departure from prior custody law in New Jersey and may well be a harbinger of

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1. Much of the following material is from an article in the New York Law Journal, by Carol Eisenberg, "Joint Custody Proceedings, Judicial Rulings Compared", New York Law Journal,August 18, 1982, p. 1.

things to come in other jurisdictions." [2] Continuing, the author states: "The New Jersey Supreme Court became the first court of last resort in the country to place its imprimatur on the concept fo shared legal and physical custody." The case is significant because it sets forth "guidelines for courts to use in determining whether or not to award joint custody" and also holds that

> (a) joint custody may be ordered over the objection of a parent;
> (b) an amicable relationship between the parents is not a prerequisite to an award of joint custody;
> (c) the capacity for cooperation in a joint custody arrangement should not be assessed in the emotional heat of the divorce; and
> (d) a parent who refuses to cooperate with a joint custody order may forfeit custody altogether.[3]

The New Jersey Supreme Court also reaffirmed the "common law policy in favor of affording children the love and affection of two parents rather than one.[4] The Court noted the current resurgence of interest in joint custody, and noted that sole custody "isolates the children from the non-custodial parent. . . and because of its win or lose nature, promotes custody disputes and

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2. Ibid.
3. Ibid.
4. Ibid.

post-decree tension.[5] The Court also found that joint custody provides "the child with access to both parents" and "is rooted in the assumption that children in intact homes develop attachments to both parents and that 'the severance of either of these attachments' is not in the child's best interests."[6] The Court also found that the child could experience "the intimate day to day contact" necessary to insure a meaningful parent-child relationship.

The Court stated that joint custody is a possibility even if neither party seeks it, as long as both are willing to care for the children.[7] Most important, the Court found that "the potential for cooperation should not be assessed in the 'emotional heat' of the divorce."[8]

Lastly, the court stated that if joint custody is feasible except for one or more of the practical considerations, the courts "should consider awarding legal custody to both parents with physical custody to only one" and to the other, visitation rights that are sufficiently liberal so as to "approximate, to the extent practicable, the shared companionship of the child and non-custodial parent that is provided in joint physical

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5. Ibid., 432 A. 2d at 65.
6. Ibid., 432 A.2d at 65, 66.
7. 432 A. 2d at 71.
8. 432 A. 2d at 71,72.

custody."[9] It also speaks of the "meticulous fact-finding required in custody cases."[10]

In the Beck case, the lower court required extensive testimony and cross-examination of the social workers, psychiatrists and psychologists and school psychologists and psychiatric social workers. The children did not want to live with their father, but with their mother with visitation with the father. Since more than two years passed since the trial court heard the testimony, the case was remanded back by the New Jersey Supreme Court for further fact-finding.

In light of this decision from the very same New Jersey Supreme Court that denied certification in this case, it is submitted that the New Jersey Supreme Court did not follow its own dictates in this case, and by in effect affirming the action of the trial court, concurred in the trial court's denial of custody and visitation without due process of law, and failed to remit this case back for further fact-finding. Accordingly, due process was denied by the courts, and the only remedy lies with this Court.

5. Depriving a mother of her children and all access to them without due process of the law is a Cruel and Unusual punishment, not only upon the petitioner-mother, but upon her children as well.

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9. 432 A. 2d at 72,73.

10. 432 A. 2d at 66.

Petitioner-mother herein has been deprived of her children and access to them as shown above, and is unconstitutional as it constitutes Cruel and Inhuman treatment prohibited by the Eighth Amendment.

The Court used "crash" investigations and outside reports and not one of the participants to these reports was placed under oath and subject to cross examination.

While this Court, in **Trop v. Dulles** (1958) 356, U. S. 86, 2 L Ed. 2d 630, 78 S. Ct. 590, stated that the exact scope of the phrase, "Cruel and Unusual" has not be detailed by this Court, and while research has not disclosed a case on point, we respectfully submit that the parting of the children from their mother, and the parting of the mother from the children, and the loss of custody under the circumstances herein was cruel and unusual punishment visited by the trial judge upon petitoner and her children, and this Court is petitioner's last hope for redress.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the Supreme Court of the State of New Jersey, and if certiorari be granted, that the matter be returned to New Jersey for further proceedings.

Respectfully submitted,

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